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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ~~74~~-862

ROBERT R. KRILICH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

The Petitioner, Robert R. Krilich, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 30, 1974.

OPINION BELOW

The opinion of the Court of Appeals in the § 2255 proceeding, which is not yet reported, appears in Appendix "A" hereto. The opinion in the direct appeal appears in Appendix "C".

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 30, 1974. A timely Petition for Rehearing was denied on October 16, 1974, and this timely Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether retroactive effect should be given a decision of the Seventh Circuit, which immediately followed an adverse ruling by the same Court in petitioner's case, wherein the Seventh Circuit admitted it erroneously decided the same issue in petitioner's case.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

Section 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * * * *

(e) The term "statement", as used in subsections (b), (c) and (d) of this section in relation to any witness called by the United States, means —

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a

substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

United States Code, Title 28:

Section 2255. FEDERAL CUSTODY; REMEDIES ON MOTION ATTACKING SENTENCE.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the

judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

The opinion of the Seventh Circuit very succinctly and accurately states the case presented. Therefore, relevant portions thereof will be stated verbatim:

"On June 6, 1971, petitioner-appellant was convicted of income tax evasion and of willfully filing a false income tax return in violation of 26 U.S.C. § 7201 and 26 U.S.C. § 7206(1), respectively. His conviction was subsequently affirmed by [the Seventh Circuit]. *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972). (App. A14) Petitioner thereafter moved to vacate his conviction pursuant to 28 U.S.C. § 2255, asserting that, in the course of his trial, he was denied access to a report prepared by an Internal Revenue Agent who testified on behalf of the government, and that he was thereby denied his constitutional right of confrontation and effective assistance of counsel." (App. A1-2)

"In the course of petitioner's earlier appeal, he urged that his conviction be reversed because, prior to the cross examination of [the Special Agent], Krilich was not afforded access to the Special Agent's Report (SAR) which [the agent] prepared in connection with the government's investigation of petitioner. In affirming his conviction, * * * [the Seventh Circuit] ruled that the SAR was not "a 'statement' as defined in 18 U.S.C. § 3500(e), and hence was not producible under the Jencks Act." (App. A2)

"Subsequently, on April 16, 1973, this court decided *United States* v. *Cleveland*, 477 F. 2d 310 (7th Cir. 1973) (hereinafter, Cleveland I), holding that the SAR is a "statement" within the meaning of the Jencks Act, 18

U.S.C. § 3500(e). . . .'' In a footnote, the court observed that ''[t]his comment is, of course, also applicable to the dictum of *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972, page 351, n. 18, . . .'' (App. A2-3)

The Court of Appeals properly recognized that the 2255 motion raised a constitutional claim, but held that its *Cleveland I* decision would be applied prospectively and should not be afforded retrospective application to petitioner's case.

''The fact that a motion under § 2255 raises a constitutional claim, however, does not necessarily mandate that the underlying conviction be vacated, even if the petitioner succeeds in establishing the claim asserted. The instant case represents one instance in which, even if the correctness of petitioner's contention were to be assumed, the claim that his underlying conviction should be vacated must be denied. *Cleveland I* clearly had the effect of changing what, in practice, had theretofore been a commonly accepted rule within this Circuit.'' (App. A5)

''Since Krilich's conviction preceded the *Cleveland* decision, his present effort to set aside that conviction requires us to consider whether *Cleveland I* should be afforded retroactive application. For the reasons herein stated, we find that *Cleveland I* should be applied prospectively only and, for this reason alone, affirm the decision of the district court.'' (App. A5)

REASON FOR GRANTING THE WRIT

Equitable Considerations Require That This Court Decide A Retroactive v. Prospective Application Question When A Circuit Court Of Appeals Acknowledges In A Decision Announcing A New Rule That It Erroneously Decided A Criminal Case Which Immediately Preceded The Correct Decision And Raised The Same Issue.

In petitioner's direct appeal one of the errors which he urged upon the Court of Appeals was that the trial court wrongfully denied him access to a report prepared by an Internal Revenue Service Special Agent who testified as a government witness at his trial. This Jencks Act issue was decided adversely to petitioner on November 28, 1972. However, on April 16, 1973, the Seventh Circuit in *United States* v. *Cleveland*, 477 F. 2d 310[1] decided the same issue which had been presented to it in petitioner's direct appeal in favor of defendant *Cleveland*.

In a footnote in the *Cleveland* opinion, the Seventh Circuit in referring to the Jencks Act issue, stated:

> "This comment is, of course, also applicable to the dictum in *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972), page 351, n. 18, . . . This opinion has been circulated to all of the active members of the court. No judge has requested that the case be heard en banc." 477 F. 2d at 316.

Thus, the Court of Appeals clearly acknowledged that it had erred in deciding petitioner's direct appeal. However, it refused to correct this gross inequity in the col-

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1. *Cleveland* was argued January 8, 1973. Briefs were submitted prior to the release of the Krilich opinion.

lateral attack under 28 U.S.C. Section 2255. Instead, in its opinion, the Court determined the error would stand since in its view retroactivity was neither mandatory under the law as enunciated by this Court (App. A6-8) nor proper under the balancing tests set forth in *Johnson* v. *New Jersey*, 384 U.S. 719 (1961) and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

The theory of retroactivity has been referred to as an "enigma wrapped in a mystery." *Vaccaro* v. *United States*, 461 F. 2d 626 (5th Cir., 1972).

> "Perhaps no other area of constitutional law is more enshrouded in puzzlement and apparent logical inconsistencies. . . . A catalog of some of the other retroactivity holdings demonstrates the perplexities. For example, while the right to counsel at a preliminary hearing where the defendant makes incriminating statements is retroactively recognized, the right to counsel during accusatorial police interrogation during which the accused makes incriminating statements is not retroactively enforced. Similarly, while the defendant's right to a fair, impartial and unbiased jury is retroactively effected, the right to an impartial judge may be given prospective application only. Likewise, the defendant is entitled to retroactive protection against the extra-judicial confessions of a co-defendant, but not of himself.
>
> Systematic exclusion of Blacks from juries calls for retroactive vindication, but systematic exclusion of women apparently does not. Newly announced standards for determining the voluntariness of confessions are retroactive, but newly announced standards for determining the voluntariness of guilty pleas are not.
>
> At the outset we recognize the impossibility of reconciling these apparent inconsistencies with any neatly constructed, logically appealing, symmetrically patterned theory or doctrine. The reason is that retroac-

> tivity is essentially a pragmatic, case-by-case, result oriented process whereby the often competing interests of society, the accused (or by now, the convicted) and the efficient administration of justice are balanced and weighed. There are no hard and fast rules, no shorthand formulae, in the retroactivity area — only factors, equities and considerations. Thus, what is dispositive of one case may be of little value in resolving any other retroactivity problem. The scales are sensitive with so much at stake, and the delicate balance shifts with each different set of facts and circumstances."
> *Vaccaro* v. *United States*, 461 F. 2d 628-629.

Petitioner finds himself in the unfortunate position of having been at the right place with the right law, but at the wrong time. This is a most perplexing and unjust situation which can only be rectified by giving the *Cleveland* decision retroactive application to petitioner's case. There was nothing that intervened between the time of petitioner's direct appeal and the Seventh Circuit's ruling in *Cleveland*. There were no other cases in the Seventh Circuit touching the underlying issue, nor did any other Circuit Court of Appeals or this Court issue any remotely related opinions. Clearly, petitioner was denied, both at his trial and in his direct appeal, his constitutionally guaranteed right of confrontation which is so imperative to a fair trial.

> "There are few subjects perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."
> *Pointer* v. *United States*, 380 U.S. 405 (1965).

The primary differences between the decision in petitioner's direct appeal and the *Cleveland* case are simply that of an accident of timing and a difference in judges on the respective panels. This is in itself "an enigma wrapped in a mystery." Certainly, the state of the law on the subject of "confrontation" had not changed and petitioner's direct appeal squarely presented the same issue. It is, therefore, incongruous that petitioner be denied the benefit of the holding in *Cleveland*. Under the circumstances presented, the Court of Appeals should have held retroactive application to petitioner's case was mandatory.

The Court of Appeals held, however, that retroactivity was not mandatory under *Williams* v. *United States*, 401 U.S. 653 (1969). This was bottomed on the conclusion that defense access to the SAR prior to cross-examination was not critical. (App. A8). Unfortunately, confrontation cannot be mathematically calculated — it is either constitutionally adequate or it is not. Confrontation through cross examination can never be adequate and productive of truth when the cross examiner has only partial knowledge of a given subject matter. Being armed in a hunt for the truth from an IRS Special Agent with less than complete facts is as meaningful as confronting a saber-tooth tiger with an empty gun. Adequate confrontation is precluded and the integrity of the truth determining process substantially impaired.

Assuming arguendo that retroactive application of *Cleveland I* is not deemed to be mandatory, it is respectfully urged that this Court exercise its supervisory power to require, based upon the balancing tests,[2] retroactive application to the date of petitioner's first trial or direct appeal. In this regard it is submitted that the equities of the case tip the balance in favor of retroactive application to petitioner's case.

The balancing test of paramount importance in this case is — "*[t]he effect on the administration of justice.*" — (App. A9) When weighed in the light of the actual number of cases affected, this case cries out for specific retroactive application.

The Court's attention is respectfully directed to the *Annual Report of Director of the Administrative Office of the United States Courts* (*table F-7*) for the appropriate periods. During the fiscal years ended June 30, 1971, June 30, 1972, and June 30, 1973, there were a total of 711 criminal appeals in the Seventh Circuit. Of these, only 31 were appeals from income tax trials. Petitioner's trial occurred during the fiscal year ending June 30, 1971, and his direct appeal during the fiscal year ending

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2. As to the two of the balancing tests applied by the Seventh Circuit, "*the purpose to be served by the new rule*," and "*the extent of reliance by law enforcement authorities on the old standard.*" (App. A9) Neither of these tests has much practical significance in this case. Reliance clearly was not detrimental to law enforcement authorities. The purpose to be served by the new standard is to comply with the constitutional mandates of confrontation and effective assistance of counsel.

June 30, 1973. The Court could apply *Cleveland I* retroactively to Krilich's appeal, thereby affecting a maximum of 14 cases. This figure is obviously inflated by those cases occurring before November 28, 1972 and after April 16, 1973, and for those cases which do not raise the 3500 issue.[3]

It is clear that there is no way on earth that this case could have the devastating effects on the administration of criminal justice that were referred to by this Honorable Court in *Storall* v. *Denno*, 388 U.S. 293, 300 and *Tehan* v. *United States, ex rel. Shott*, 382 U.S. 406, 419. Law enforcement would not be affected at any level and there are only a handful of cases involved.

What is involved, however, is much broader than simply granting relief to petitioner per se. The trust and confidence which all citizens of the United States repose in our judicial system will substantially diminish unless the gross inequity suffered by petitioner is rectified. We all know that part of the human experience is to err. The correction of mistakes is part of the living experience which must permeate not only business and social intercourse among the citizens of this country, but which must be an integral and ongoing process for a viable constitutional government. The mistake which occurred in petitioner's direct appeal must be corrected by retroactive application of *Cleveland* to petitioner's case.

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3. There were 14 criminal tax appeals in the fiscal year ending June 30, 1973, 10 for the fiscal year ending June 30, 1972, and 7 for the year ending June 30, 1971.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 73-1948

ROBERT R. KRILICH,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70-CR-316
Frank J. McGarr, *Judge.*

Argued December 7, 1973 — Decided August 30, 1974

Before SWYGERT, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and CAMPBELL, *Senior District Judge.**

CAMPBELL, *Senior District Judge.* On June 6, 1971, petitioner-appellant was convicted of income tax evasion and of willfully filing a false income tax return in violation of 26 U.S.C. § 7201 and 26 U.S.C. § 7206 (1), respectively.

*Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

His conviction was subsequently affirmed by this court. *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972). Petitioner thereafter moved to vacate his conviction pursuant to 28 U.S.C. § 2255, asserting that, in the course of his trial, he was denied access to a report prepared by an Internal Revenue Agent who testified on behalf of the government, and that he was thereby denied his constitutional right of confrontation and effective assistance of counsel. This appeal follows the district court's denial of his motion.

In the course of petitioner's earlier appeal, he urged that his conviction be reversed because, prior to the cross-examination of Special Agent Popovits, Krilich was not afforded access to the Special Agent's Report (SAR) which Popovitz prepared in connection with the government's investigation of petitioner. In affirming his conviction, this court ruled that the SAR was "not a 'written or recorded statement * * * made by the defendant' within the meaning of Rule 16(a)(1) of the Federal Rules of Criminal Procedure under which production was sought". 470 F. 2d at 351. In addition, in reliance upon the language of *United States* v. *Keig*, 334 F. 2d 823, 825 (7th Cir. 1964), this court ruled that the SAR was not "a 'statement' as defined in 18 U.S.C. § 3500(e), and hence was not producible under the Jencks Act either."

Subsequently, on April 16, 1973, this court decided *United States* v. *Cleveland*, 477 F. 2d 310 (7th Cir. 1973) (hereafter, *Cleveland I*),[1] holding that the SAR is a "state-

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1. We refer to the *Cleveland* decision as *"Cleveland I"* because there is currently pending before this court a second appeal by the defendant in that case challenging the correctness of the district court's ruling on remand from the first appeal.

ment'' within the meaning of the Jencks Act, 18 U.S.C. § 3500(e), and expressly disapproving ''the language of that [*Keig*] opinion insofar as it may be read to imply that a Special Agent's Report is not a statement within subsection (e)''. 477 F. 2d at 316. In a footnote, the court observed that ''[t]his comment is, of course, also applicable to the dictum of *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972), page 351, n. 18, . . .''.

On appeal from the denial of his motion pursuant to 28 U.S.C. § 2255, petitioner contends that, in light of this court's decision in *Cleveland I*, he was denied his constitutional rights of confrontation and effective assistance of counsel both at trial and on appeal from his conviction, and that he is therefore entitled to a new trial. For the reasons stated herein, we affirm the decision of the district court.

The government first contends that the issue before us is of an ''evidentiary nature'' and not of constitutional proportions, and that it therefore cannot be raised collaterally under 28 U.S.C. § 2255. We disagree. The essence of petitioner's claim is that his constitutional right of confrontation was infringed through the allegedly erroneous denial of material which he contends would have enhanced his ability to cross-examine an important government witness. Clearly, the principal purpose of requiring the government to disclose prior written statements of a witness which relate to that witness' direct testimony is to facilitate cross-examination. It is principally through cross-examination that a defendant exercises his right to confront witnesses called to testify against him.[2] Conversely,

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2. See *United States* v. *Aaron*, 457 F. 2d 865, 869 (2nd Cir. 1972); *United States* v. *Missler*, 414 F. 2d 1293, 1303 (4th Cir. 1969).

the failure to provide material to which the defense is entitled under the Jencks Act may adversely affect a defendant's ability to cross-examine government witnesses and thereby infringe upon his constitutional right of confrontation. Non-compliance with a statute which has as one of its purposes the effectuation of a constitutional right presents an issue of sufficient constitutional dimension to warrant consideration under 28 U.S.C. § 2255.[3]

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3. We note also that the Supreme Court has recently rejected the proposition that only claims of a constitutional nature may be raised under § 2255. In *Davis* v. *United States*, 42 LW 4857 (June 10, 1974), ——U.S.—— (1974), the court held that the language of § 2255 permits one in federal custody to seek relief under that statute where he claims that his confinement is "in violation of the Constitution or *laws* of the United States." The court added, however, that where a petitioner asserts that his confinement is in violation of the laws of the United States, "the appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice' and whether [i]t . . . presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." 42 L.W. at 4861, ——U.S.—— at——.

For the reasons stated herein, we do not believe the alleged error in the instant case would, if established, inherently result in a complete miscarriage of justice. Nevertheless, since we consider the Jencks Act a vehicle for effectuating and enhancing the defendant's constitutional right of confrontation, we view the petitioner's claim as one of sufficient constitutional dimension for the purposes of § 2255.

The fact that a motion under § 2255 raises a constitutional claim, however, does not necessarily mandate that the underlying conviction be vacated, even if the petitioner succeeds in establishing the claim asserted. The instant case represents one instance in which, even if the correctness of petitioner's contention were to be assumed,[4] the claim that his underlying conviction should be vacated must be denied. *Cleveland I* clearly had the effect of changing what, in practice, had theretofore been a commonly accepted rule within this Circuit. As evidenced by *United States* v. *Krilich*, 470 F. 2d 341 (7th Cir. 1972) and *United States* v. *Lacob*, 416 F. 2d 756, 761 (7th Cir. 1969), this court's decision in *United States* v. *Keig*, *supra*, had been consistently interpreted as excluding the SAR as a statement under 18 U.S.C. § 3500(e).

Since Krilich's conviction preceded the *Cleveland* decision, his present effort to set aside that conviction requires us to consider whether *Cleveland I* should be afforded retroactive application. For the reasons herein stated, we find that *Cleveland I* should be applied prospectively only and, for this reason alone, affirm the decision of the district court.

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4. The government asserts that *Cleveland* does not require that Krilich's conviction be vacated, apparently contending that the trial judge reviewed the SAR and found "nothing that would be producible in the report" (Government's brief, p. 4). Since we hold today that *Cleveland* is to be applied prospectively only, we do not consider the issue of whether retroactive application of *Cleveland* would require that petitioner's § 2255 motion be granted.

Linkletter v. *Walker*, 381 U.S. 618 (1965) "was the first of a long line of cases giving prospective effect to rules newly propounded in the field of constitutional criminal procedure." *Adams* v. *Karlson*, 488 F. 2d 619, 626 (7th Cir. 1973). Decisions concerning retroactivity rendered subsequent to *Linkletter*, many of which are cited and discussed in the *Adams* opinion, 488 F. 2d at 626, 627, have gradually developed a composite of fairly workable guide lines for determining whether a change in previously accepted decisional law should be applied prospectively only. These decisions demonstrate that under either of two circumstances a new rule of law *must* be applied retroactively.

The first is where the effect of the new rule "is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Robinson* v. *Neil*, 409 U.S. 505, at 509 (1973). Retroactive application is mandated in such instances because the defendant was not properly amenable to prosecution in the first place. Thus the *Robinson* Court applied *Waller* v. *Florida*, 397 U.S. 387 (1970) retroactively because Robinson's second trial should have been foreclosed by operation of the Double Jeopardy Clause. See also *United States* v. *U. S. Coin & Currency*, 401 U.S. 715 (1971).[5]

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5. The Supreme Court's recent decision in *Davis* v. *United States*, 42 LW 4857 does not consider whether the Ninth Circuit's decision in *United States* v. *Fox*, 454 F. 2d 593, which Davis contended "effected a change in the law of that circuit after the affirmance of his conviction" 42 LW at 4859, should be applied retroactively. But the court did note that the substance of Davis' contention was that *Fox* "establishes that his induction order was invalid

The second circumstance requiring retroactive application of a new rule was defined in *Williams* v. *United States*, 401 U.S. 646 at 653 (1969):

> "where the major purpose of new *constitutional doctrine* is to overcome an aspect of the criminal trial that *substantially impairs its truth finding function* and *so raises serious questions about the accuracy of guilty verdicts in past trials*, the new rule has been given retroactive effect." (emphasis added)

Williams held that *Chimel* v. *California*, 395 U.S. 752 (1969) should not be given retroactive effect. Similarly, *Adams* v. *Illinois*, 405 U.S. 278 (1972), after acknowledging the rule enunciated in *Williams*, held that *Coleman* v. *Alabama*, 399 U.S. 1 (1970) (right to counsel at the preliminary hearing) should not be applied retroactively. On the other hand, this principle is consistent with the retroactive application afforded *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel at trial) and *Jackson* v. *Denno*, 378 U.S. 368 (1964) (use of a coerced confession at trial). See also, cases cited at 401 U.S. 646, 653, n. 6.

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under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order." The court then expressed the view that "[i]f this contention is well-taken, then Davis' conviction and punishment are *for an act that the law does not make criminal.*" (emphasis added) 42 LW at 4861. In short, at least with respect to the facts of the *Davis* case, *Fox* warranted retroactive application because the effect of the ruling in *Fox* was "to prevent a trial from taking place at all, . . ." *Robinson* v. *Neal*, *supra*. Unlike *Fox*, the rule announced in *Cleveland* I would not operate to foreclose further prosecution of petitioner.

The new rule announced in *Cleveland I* does not foreclose the government from proceeding against the defendant — it does not "prevent a trial from taking place at all" — and thus does not present an instance appropriate for application of the *Robinson* rule. And although production of the SAR as a 3500 statement may be assumed to enhance the quality of the cross-examination and to thereby effectuate petitioner's constitutional right of confrontation, the rule enunciated in *Cleveland I* does not meet the *Williams'* standard for mandatory retroactive application since it can hardly be characterized as a "new constitutional doctrine". More importantly, we do not believe that defense counsel's lack of access to the SAR prior to cross-examination can properly be said to so substantially impair the truth finding function as to raise a "serious question about the accuracy of guilty verdicts in past trials".

Accordingly, the issue of retroactivity here must be determined by application of the balancing tests reflected in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) and *Stovall* v. *Denno*, 388 U.S. 293 (1967).

Johnson held that the:

> "question of whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process at trial is necessarily a matter of degree. . . . [W]e denied retroactive application of *Griffin* v. *California, supra*, despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why defendant had refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to

> which other safeguards are available to protect the integrity of the truth determining process at trial." 384 U.S. at 728-729.

Stovall directs us to consider three criteria for determining whether a new rule should be applied retroactively: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the retroactive application of the new standards." 388 U.S. 297.

Applying the standards of *Johnson* and *Stovall*, we conclude that *Cleveland I* should not be applied retroactively. Although, as we have said, the ability to cross-examine the government's witness is furthered by the rule announced in *Cleveland I*, the degree to which the fact finding process is actually enhanced is not so substantial as to warrant reopening numerous previously decided criminal tax cases. The impact on the integrity of the truth determining process which results from the government's failure to tender the SAR as a 3500 statement is somewhat diminished by the availability of other safeguards, including defense counsel's access to other documents reflecting much of the information contained in the SAR. Thus, while the fact finding process was certainly affected, we cannot conclude that the procedures followed prior to *Cleveland I* impaired the integrity of the truth determining process to the substantial extent necessary to warrant retroactive applica-

tion of *Cleveland I* under the guide lines announced in *Johnson.*[6]

Turning to the *Stovall* criteria, since *Cleveland I* construes the scope of § 3500 (e), the purpose to be served by the new rule is that which is served by subsection (e), i.e., to provide access to material in the government's possession in order to effectuate the defendant's right of confrontation through more effective cross examination of government witnesses. Since this purpose can be effectuated through prospective application of *Cleveland I*, and since we do not believe the integrity of the truth determining process was so adversely affected by pre-*Cleveland I* practices to warrant retroactive application of the new rule under the guide lines announced in *Johnson*, we conclude the *purpose* to be served by the new standard does not require application of that standard retroactively. Secondly, the *Stovall* Court gave particular emphasis to the extent of reliance upon pre-*Stovall* standards. In the instant case, the district courts of this circuit, particularly after *United States* v. *Keig*, 334 F. 2d 823, 825 (7th Cir. 1964), had sufficient reason to rely on the understanding that the SAR was not a "statement" within the mean-

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6. To the extent that the fact finding process has been affected by the failure to produce the SAR, we do not consider the impact nearly as substantial as that which resulted from the decisions in *Griffin* v. *California*, 380 U.S. 609 (1965), held not retroactive in *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Coleman* v. *Alabama*, 399 U.S. 1 (1970), held not retroactive in *Adams* v. *Illinois*, 405 U.S. 278 (1972); and *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), held not retroactive in *Stovall* v. *Denno*, *supra*.

ing of 18 U.S.C. § 3500(e). *Cleveland I* acknowledged that "there is indeed language in the [*Keig*] opinion which supports this interpretation. . . ." 477 F. 2d at 315, and considered the district court's failure to inspect the SAR in that case as an "error which may have stemmed from an understandable reliance on *Keig*. . . ." 477 F. 2d at 316, n. 9.

The last of Stovall's criteria — the effect on the administration of justice — also argues against applying *Cleveland I* retroactively, since it may be expected that those convicted in the past of income tax offenses, regardless of the actual strength of the evidence against them, will otherwise return to the district court seeking to vacate their convictions and demanding new trials because the SAR was not included in the § 3500 material tendered prior to cross-examination. Even if the government desired to do so, it is predictable that many of these cases simply could not be retried, either because of the unavailability of witnesses or the destruction of non-evidentiary documents, such as the SAR.

The views which we express today should not be misconstrued as denigrating the importance of the government's obligation to tender § 3500 material to the defense. Where the government fails to comply with the requirements of the Jencks Act, a conviction should be reversed unless it is *perfectly clear* that the defense was not prejudiced by the omission. *United States* v. *Cleveland*, 477 F. 2d 310, 316, n. 9 (7th Cir. 1973); *United States* v. *Aaron*, 457 F. 2d 865, 869 (2nd Cir. 1972); *United States* v. *Missler*, 414 F. 2d 1293, 1304 (4th Cir. 1969). Nevertheless, on the basis of the aforementioned guide lines enunciated and

applied in numerous Supreme Court decisions, we hold that *Cleveland I* should not be applied retroactively.[7] Accordingly, we affirm the decision of the district court.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

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7. Since *Cleveland I* relates to trial procedure, we hold that the rule promulgated therein shall be prospectively applicable to any case regarding which the judgment of conviction was entered after April 15, 1973.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

October 16, 1974

Before

Hon. Luther M. Swygert, Chief Judge
Hon. Latham Castle, Senior Circuit Judge
Hon. William J. Campbell, Senior District Judge*

No. 73-1948

ROBERT L. KRILICH, Petitioner-Appellant, vs. UNITED STATES OF AMERICA, Respondent-Appellant.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 70-CR-316 Frank J. McGarr, Judge.

On consideration of the petition of petitioner-appellant, Robert R. Krilich, for a rehearing in the above entitled appeal, and the members of the panel having voted to deny rehearing,

IT IS HEREBY ORDERED that the petition for rehearing be, and the same is hereby denied.

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*Senior Judge William J. Campbell of the United States District Court for the Northern District of Illinois is sitting by designation.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 71-1678.

UNITED STATES OF AMERICA,
Plaintiff-Appellee
v.
ROBERT R. KRILICH,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 70-CR-316
Frank J. McGarr, *Judge.*

Argued September 22, 1972 — Decided November 28, 1972

Before SWYGERT, Chief Judge, and CUMMINGS and SPRECHER, Circuit Judges.

Cummings, Circuit Judge

In June 1970, a two-count indictment was returned against defendant charging him with income tax offenses. The first count alleged that on his 1963 income tax return he willfully and knowingly made and subscribed statements, verified by a written declaration that they were made under the penalties of perjury, which he did not believe to be true and correct as to every material matter, in that he claimed a net long-term capital gain in the amount of $451,128.88, knowing that the gain was sub-

stantially in excess thereof. This was charged to violate 26 U.S.C. § 7206(1).[1]

The second count alleged that he willfully and knowingly attempted to evade income taxes by filing a false and fraudulent 1963 income tax return disclosing taxable income of $97,718.93, with tax due in the amount of $51,978.89, whereas, as he well knew, his taxable income was $246,042.78, with tax due in the amount of $118,858.54. This was said to violate 26 U.S.C. § 7201.[2]

The indictment was based upon defendant's increase of the cost basis of two parcels of real estate sold in 1963

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1. 26 U.S.C. § 7206 provides in pertinent part:
"Any person who—

"(1) *Declaration under penalties of perjury.*—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; • • • shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

2. 26 U.S.C. § 7201 provides:
"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

by including in the basis shown in his 1963 income tax return (a) $95,048.84 owed to Berry Electric Contracting Company ("Berry") for work it had done in the construction of the Lawrencewood Shopping Center in Niles, Illinois, and (b) $200,000 for a supposedly fictitious obligation to install sewers on the property. This would mean that defendant had underreported his long-term capital gains by $122,523.76, had understated his taxable income by $58,136.88 and had underpaid his 1963 income taxes by $45,085.59 (Govt. Ex. 17).[3] After a bench trial, defendant was found guilty on both counts, given eighteen-month concurrent sentences and fined $5,000. We affirm.

I. *Sufficiency of the Evidence*

In 1962, defendant purchased 23.6 acres of useable land in Schiller Park, Illinois, from Sam Papanek (and apparently from his brother, John Papanek) for $310,878.03. For purposes of this appeal the Government accepts defendant's figure of $39,231.22 for expenses, resulting in a correct basis for the property of $350,109.25. Defendant now admits that an additional $95,048.84 owed to Berry

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3. These figures are based on Govt. Ex. 17 which uses $33,031.22 as the amount of expenses Krilich incurred in purchasing the property to arrive at the cost basis of the property. As noted in the text, *infra*, the Government is willing to accept defendant's figure of $39,231.22 as the amount of acquisition expenses for purposes of this appeal. Of course, if the cost basis is increased by $6,200.00, that amount would have to be partially allocated to the two parcels of real estate sold in 1963, and the amounts of long-term capital gains, taxable income, and taxes owing as set forth in Govt. Ex. 17 would correspondingly change and alter the figures given in the text to which this note is attached.

on a separate transaction "was mistakenly applied" by defendant in computing the cost of this property. This sum was owed to Berry for work done at defendant's Lawrencewood Shopping Center — a different piece of property and a completely unrelated transaction. The cost basis of the Schiller Park property was incorrectly increased in this amount as follows: Defendant's purchase of this property from Papanek was pursuant to an escrow agreement established at the Chicago Title & Trust Company on September 10, 1962.[4] Defendant was to re-

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4. Defendant claimed to be entitled to long-term capital gain treatment on the sale of two portions of this property on the theory that he made a contract to purchase the Schiller Park land from Steven O'Donnell on May 3, 1961, and that the holding period should run from that date. However, O'Donnell never owned the property and in May 1961 was merely anticipating securing title to it, an expectation which never materialized. The contract with O'Donnell never was consummated and Krilich signed an escrow agreement to purchase the property from Sam Papanek in September 1962, under whose terms title would not have passed until $259,878.03 was deposited in March 1963. While we are not concerned with whether Krilich committed an offense in using the May 1961 date (and while the propriety of long-term gain treatment is assumed in the calculations herein), it seems incredible that Krilich would reasonably, or even mistakenly, believe that May 3, 1961, was his acquisition date, especially in view of O'Donnell's disclaimer of ever having owned the property.

ceive the deed for the property upon deposits of $51,000 and $259,878.03, or a total of $310,878.03.[5] Defendant's first payment in the amount of $51,000 was by his check of September 13, 1962. The escrow agreement provided that the second payment of $259,878.03 could be "proceeds of a loan to be deposited under a separate money-lender's escrow." Defendant and Berry entered into such an escrow agreement on March 11, 1963, and defendant's title was recorded on March 27, 1963. The escrow agreement stated that defendant was about to acquire title to this property and provided that Berry would deposit $259,878.03 in escrow at the Chicago Title & Trust Company to be used to consummate the purchase. In turn, defendant was to issue his promissory note to Berry in the sum of $354,926.87. This amount consisted of the $259,878.03 payment due on the purchase of the land, plus an unrelated $95,048.84 owed Berry by defendant for the work Berry had done at the Lawrencewood Shopping Center.

The entries made in defendant's books failed to reflect that the aforesaid $354,926.87 consisted of a $259,878.03

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5. The purchase-escrow agreement provided for an additional payment of $140,021.97 on the contingency that a firm, apparently unrelated to the seller or purchaser, deposit certificates attesting to the installation of storm sewers complying with village ordinances and to the rezoning of the property. Defendant has shown no connection between this provision and the $200,000 increase in the cost basis of the north tract of Schiller Park property sold to Parrish in 1963 (see *infra*), nor does he argue that it supports it in any way. Nothing in the record indicates nor does the defendant contend that the contingency ever occurred.

loan and the old debt of $95,048.84. Thus there is an August 31, 1963, entry in defendant's books debiting the Lawrencewood Shopping Center account in the amount of $354,926.87 and crediting the note to Berry in the same amount per the March 1963 agreement.[6]

Thereafter, Herbert A. Maier, an accountant who took care of defendant's and the Lawrencewood Shopping Center's books, discovered that the $354,926.87 was not properly debited to the Shopping Center. Pursuant to defendant's instructions,[7] Maier made an adjusting entry removing the $354,926.87 from the Shopping Center account and entering it in defendant's land account. This adjustment likewise did not distinguish between the $259,878.03 second payment on the Schiller Park property and the unrelated $95,048.84. The total of these two sums was entered in the land ledger account, incorrectly increasing the cost basis of the property by $95,048.84.

[1] In our view, the district court could properly find the $95,048.84 misapplication to the basis of the property to be willful. Unlike us, the district judge as the trier of facts had the benefit of personally judging the credibility of the witnesses tendered by both parties. The amount in question was buried as part of the Schiller Park cost ba-

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6. The next entry in the journal reflects a repayment of the $259,878.03 to Berry from the proceeds of a sale of six acres of the property to Joseph D. Testa.

7. The adjustment was labeled in the books as "per RRK", referring to defendant.

sis, and its true origin was difficult to trace. Defendant was a sophisticated taxpayer, not a "babe in the woods."[8] According to accountant Maier, the entry erroneously including this amount in the cost of the Schiller Park property was made at defendant's direction and therefore marked "Per RRK." The agreement defendant entered into with Berry on March 11, 1963, clearly distinguished between the $259,878.03 which Berry was to deposit for the purchase of the Schiller Park property and other debts owed Berry by defendant. The repayment provisions of this agreement explicitly maintained the same difference, as did the treatment of the funds received from the sale of six acres to Testa (see note 6 *supra*). The addition of the $95,048.84 to the cost of the Schiller Park property gave defendant a present financial benefit in the taxable year 1963. Therefore, it is immaterial that he may have lost the opportunity of including it in the Lawrencewood books for depreciation over a period of years. As the trial judge stated in denying the first motion for acquittal,

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8. Defendant's knowledge of federal income tax law was evidenced, for instance, by Parrish's sole stockholderer's testimony that when he was negotiating with defendant for the purchase of eight acres of the property (see *infra*), the defendant insisted that two contracts be entered into — one for the sale of the land with defendant as the seller, and one for the installation of certain underground water and sewer improvements with Krilich Builders, Inc. as the contractor — instead of combining both transactions in a single contract, so that defendant could avoid being treated as a developer for tax purposes and thereby be able to qualify for capital gains treatment on the sale of the land.

"I think the allocation as it was actually done gave the taxpayer a significant tax advantage over whether it had been properly allocated in the first place." Furthermore, from Maier's testimony, it would appear that the $95,048.84 had not actually been deleted from the cost of the Lawrencewood Shopping Center and was included in its depreciation for tax purposes. Finding in a tax case necessarily often involves a subtle determination. Our conclusion is that the finding here as to the $95,048.84 item was sufficiently supported to warrant countenance.

In April 1963, defendant contracted to sell approximately six acres of the Schiller Park property south of Lawrence Avenue (except the east 250 feet thereof) to Joseph D. Testa for $283,500. Title was conveyed by defendant's land trustee in June 1963. The documents effectuating this transaction do not refer to any obligation of defendant to install sewers of any kind on this tract, although defendant did tell Testa that he had engineering plans relating to the installation of storm sewers along Lawrence Avenue. Subsequently Testa installed his own sewers and water mains and rerouted a diagonal ditch on his property. However, he never agreed that defendant should install sewers on the property, nor did defendant reimburse Testa for his sewer construction. In reporting his gain on the sale of the land to Testa, defendant did not include any amount for storm sewers in computing his basis.

On August 23, 1963, defendant's land trustee of the remainder of the Schiller Park tract contracted to sell approximately eight acres of the property north of Lawrence Avenue (except the east 445 feet thereof) to John Parrish Enterprises, Inc. ("Parrish") for $542,000. The contract made no reference to any obligation of defendant

or the trustee to install sewers. A second contract between Parrish and Krilich Builders, Inc. (whose president was defendant) provided that Parrish pay $58,000 for the installation of small sewers and water connections on the property Parrish purchased.[9] These improvements were not those for which defendant claimed he was obligated in the amount of $200,000. Defendant wanted the total purchase price of $600,000 divided into two portions ($542,000 for the sale of land and $58,000 for the installation of sewer and water lines), so that he could obtain capital gains treatment instead of being treated as a developer for tax purposes.[10] Parrish and its sole stockholder, John E. Perisich, had no other contract with defendant or Krilich Builders regarding the Schiller Park property purchased by Parrish.

Defendant's brother-in-law, Allen Sorenson, the Secretary of Krilich Builders, testified that early in 1962 he and defendant had discussed the possibility of enclosing the ditch along the south side of Lawrence Avenue and cutting diagonally across the property eventually sold to Testa. Accordingly, an engineer was hired to prepare drawings concerning the enclosing of the ditch with large pipe at a cost of $165,000 to $200,000. The plans also covered the installation of a storm sewer crossing under Lawrence Avenue. All these plans related to the south side of Lawrence Avenue and involved only storm sewers.

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9. The $58,000 was not reported in defendant's personal tax return as part of the sale price because Krilich Builders, Inc., and not Krilich in his individual capacity, was the contracting party.

10. See note 8 *supra*.

In early June 1964, defendant delivered his books and records to accountant Leon Solomon for the preparation of defendant's 1963 income tax return. Solomon prepared a return, which was never filed, allocating $146,207.15 as defendant's cost of the land sold to Parrish. Solomon testified that when he prepared the return, the last entry on defendant's ledger increasing his cost of the Parrish property by $200,000 was not on the records because Solomon's tick mark was not opposite the $200,000 entry. Solomon used tick marks to identify the entries in the books he used in preparing defendant's return because defendant had complained that Soloman had not reported all 1960 interest deductions the book entries entitled him to in preparing defendant's 1960 tax return, and with tick marks Solomon could identify entries made *ex post facto*. Soon after defendant received a copy of the return prepared by Solomon, defendant told accountant Maier that the basis of the Parrish property should be higher because of a sewer contract connected therewith and presented by defendant to Maier. Defendant had not previously given this information to Solomon when he prepared the original return. In consequence of this advice, Maier made entries in defendant's books increasing the cost basis of the Parrish property by $200,000. Defendant had Maier rather than Solomon prepare an altered 1963 income tax return reflecting this increase in the cost. This was the return actually filed by defendant.

Defendant's principal argument to support the validity of the $200,000 Parrish property cost increase is his purported contractual obligation to pay Krilich Builders, Inc. $200,000 for sewer work. This argument is based on a very brief contract, bearing a date of September 25, 1963, be-

tween defendant and Krilich Builders, whereby he agreed to pay Krilich Builders $200,000

> "to install all underground improvements to the property in Schiller Park, Illinois, as per the Plat of Subdivision attached hereto and marked as Exhibit A; to include all necessary storm, sanitary and water mains, and including the crossing under Lawrence Avenue and tying into the main storm creek for services necessary to comply with the Village of Schiller Park."

Exhibit A was missing from the copy of the agreement inspected by the Government and has not been produced by defendant.[11] Nothing in the contract ties the installation to any obligation respecting the already sold Parrish tract. It was never signed by the land trustee, the holder of the legal title to the property, but only by defendant, and on September 29, 1965, during the investigation of his 1963 tax return, defendant advised his accountant Maier that said contract "is void in toto."

The foregoing résumé shows that defendant did not obligate himself to Testa or Parrish to supply any storm sewers. Defendant never made such installations. The purported contract of September 25, 1963, between defendant and Krilich Builders, Inc. does not refer to the storm sewer (an enclosed ditch) south of Lawrence Avenue and

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11. Defendant's brief takes the position that the contract covered the entire tract purchased by Krilich. If so, $200,000 could not be properly assigned to the cost basis of the tract sold to Parrish. Of course, such an improper allocation is not the gravamen of the Government's contention here, but the spuriousness of the contract is.

single crossing discussed by defendant and the Secretary of Krilich Builders in 1962. It cannot reasonably be interpreted as the consummation of these discussions. Rather, the contract evidently related to totally different improvements on the Parrish tract, for the above-quoted description in the contract so suggests. Moreover, accountant Maier testified that, to the best of his recollection, when defendant presented him with the contract and conversed with him, the contract related either to the Testa or Parrish parcel, and defendant said one of the two properties was worth more because of the sewer, and Maier actually increased the cost of the Parrish parcel by $200,000. If the contract had actually referred to improvements south of Lawrence Avenue, the $200,000 obligation should not have been assigned to Parrish's north parcel, and, more importantly, the installation would still have been a "gift" to Testa in any event. Testa installed his own sewers on the south parcel he bought. The trier of fact could properly infer that the contract was spurious because defendant had already sold the south property to Testa and had already contracted to sell the north property to Parrish without in either case assuming any obligation to install sewers. The court was certainly justified in concluding that the contract dated September 25, 1963, was not *bona fide* and was hastily executed or spuriously discovered merely to convince accountant Maier in June 1964 that the cost basis of the Parrish property should be increased by $200,000. In this respect, it is surely significant that defendant did not exhibit the contract to accountant Solomon who had prepared the initial 1963 tax return showing the cost basis at only $146,207.15, but only tardily presented it to Maier after defendant saw his tax liability as computed in Solomon's return.

[2] In sum, none of the witnesses or documentary evidence submitted by defendant supports the good faith or mere mistakenness of his belated $200,000 addition to the cost basis of the Parrish property. On the contrary, the evidence overwhelmingly supports the trial court's finding of willfulness, which we accordingly sustain as to the $200,000 overpadding.[12]

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12. Defendant relies on *Herzog Building Corporation* v. *Commissioner*, 44 T.C. 694 (1965), apparently for the proposition that the erroneousness of the $200,000 addition to the basis of the Parrish tract is legally debatable and so concludes he could not possibly have entertained a criminal intent. Of course, nothing in *Herzog* suggests that a sham contract with a third party for sewer improvements could possibly give rise to a legitimate issue with respect to the propriety of the $200,000 basis increase, and to intimate otherwise is ludicrous. Nothing in *Herzog* suggests either that though defendant was under no obligation whatever to install sewers on previously sold property, he could reasonably expect properly to increase the basis of that property by later entering into a sewer contract with a third party benefitting that property, even making the incredible assumption that he was doing that.

Defendant also relies on a passage in *Jefferson Memorial Gardens, Inc.* v. *Commissioner of Internal Revenue*, 390 F. 2d 161, 166 (5th Cir. 1968), stating "that properly estimated costs of improvements to subdivided real estate is a capital expenditure allocable to the basis of the various unsold lots to be recovered by the developed upon his ultimate sale of the lots." We have no quarrel with that proposition, but even assuming, contrary to supported fact, that defendant acted in good faith, it does not describe what defendant did.

II. *Suppression of Records*

Defendant asserts that his pretrial motions to suppress evidence should have been granted. The matters in question were:

1. 1964–1966 copies of records of defendant and work papers of Internal Revenue Service audit agent Leigh Brown, who had been assigned on December 8, 1964, to examine defendant's personal returns for 1960–1963. His audit closed on July 6, 1966.
2. Krilich's conversation with Special Agent Popovitz on November 17, 1969, in connection with his investigation of the income tax returns of Sam Papanek.
3. Krilich's conversations with Special Agent Popovitz on November 18, 1969, in connection with his income tax investigation of Papanek.
4. Defendant's records submitted by defendant's accountant Schelly to Revenue Agent Paul Seto on September 15, 1969, and on November 18, 1969, under an August 12, 1969, summons concerning the investigation of the income tax returns of Edward Bluthardt, Mayor of Schiller Park. These records related to defendant's Schiller Park property involved in the present indictment.

Defendant claims that these conversations and records were really secured for a criminal investigation of defendant, with the references to the Papanek and Bluthardt tax investigations as "a ruse and a facade" or a "pretense." Apparently the thrust of this claim is that incriminating evidence was obtained in violation of defendant's Fifth Amendment right.

[3] Following the hearings on the motions to suppress, the district judge concluded that Revenue Agent Leigh Brown's investigation of defendant's civil tax liabilities had closed in 1966 and that these records and work papers were not in any way related to the 1969 criminal investigation of defendant. We fully agree with that conclusion. Special Agent Popovtiz testified that the Brown work papers were attached to a memorandum concerning Sam Papanek and his brother John Papanek and were used by Popovitz before November 17, 1969, in investigating Sam Papanek's tax liabilities. It was suspected that in reporting a sales price of $237,000 from the sale of the Schiller Park property to Krilich, the Papaneks had not reported the full amount they had received since subsequent sales of the property from three to six months later brought over $800,000. Sam Papanek was then under a criminal tax fraud indictment concerning his transaction with defendant in 1963; his brother John was later indicted. As part of his investigation, Popovitz was required to determine the true price at which the Papaneks sold the Schiller Park property to Krilich in 1963. Popovitz inspected Brown's work papers for this purpose as a starting point in his investigation.

[4, 5] The November 17, 1969, interview with defendant was in pursuance of the same investigation and was designed to ascertain the correct selling price received by the Papaneks from defendant, the exact date of sale, and the amount for which defendant sold part of the property in August 1963.[13] Since the defendant was given *Mi-*

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13. Special Agent Oshiro accompanied Popovitz to this interview solely to act as a witness.

randa warnings at this interview, he cannot complain that the information he gave was extracted in violation of his Fifth Amendment right not to be compelled to incriminate himself. However, simply because *Miranda* warnings were given does not mean that defendant was a suspect toward whose ultimate conviction the Government's investigation was directed. In this case it appears the warnings were given out of an abundance of caution because of possible collateral criminal consequences to defendant in the investigation of the Papaneks. As the Government points out, if Popovitz was proved wrong in his hypothesis that the Papaneks underreported the selling price, it was possible that defendant had overstated his basis since he had reported a cost basis of over $600,000 for portions of the property purchased from the Papaneks. But the fact remains that the November 17th interview with defendant was in pursuance of Popovitz' investigation of the Papaneks. It was not until December 2, 1969, that Popovitz requested that a criminal investigation of defendant be opened and not until December 22nd of that year that the investigation was officially opened. Contacts with the defendant subsequent to one of these dates would have to be attended by *Miranda* warnings, but we need not decide between the two since the contacts giving rise to all the matters sought to be suppressed predated both these dates. See *United States* v. *Dickerson*, 413 F. 2d 1111, 1112–1113, 1117 (7th Cir. 1969).

On November 18, 1969, Popovitz phoned defendant as a follow-up to his interview the preceding day, but since nothing tending to incriminate the defendant came out of this conversation, we need not be concerned with it in any event.

[6] Also on November 18, Revenue Agent Seto obtained certain records from defendant's accountant Schelly. This request for records was pursuant to an August 12, 1969, Internal Revenue Service summons obtained for the purpose of investigating a third party, Edward Bluthardt, Mayor of Schiller Park, and served on defendant's accountant by Special Agent Oshiro. The testimony at the hearing on the motion to suppress established that Seto and Oshiro were investigating the possibility of additional income taxes due from Mayor Bluthardt on unreported income gained for his assistance in obtaining the rezoning of defendant's Schiller Park property sold to Testa and Parrish. Defendant's records were summoned in an attempt to trace the suspected transfer of money. Revenue Agent Oshiro obtained records pursuant to the summons on September 15 as well as on November 18, 1969. Since the IRS employees' testimony at the hearing was not controverted, the district court was certainly entitled to conclude that the records obtained on these dates were acquired in connection with the investigation of the federal income tax liability of Mayor Bluthardt and not a camouflage to determine if defendant should be indicted. See *United States* v. *Campione*, 416 F. 2d 486, 488–489 (7th Cir. 1969).

[7, 8] Defendant next argues that the November 17, 1969, conversation should be suppressed because the Special Agents in attendance did not advise defendant that they "had the function of investigating the possibility of criminal tax fraud" pursuant to Internal Revenue Service instructions of October 3, 1967 (reproduced in 420 F. 2d at 811). However, this regulation requires that such a statement be given only to "persons suspected of criminal tax fraud." At the time of that interview, as shown by

Special Agent Popovitz' unimpeached testimony, he was investigating only the possible criminal tax liabilities of the Papaneks. As aforesaid, Popovitz did not suggest a preliminary criminal investigation of defendant until December 2, 1969, and defendant's case was not assigned to a Special Agent until December 22, 1969, so that there was no violation of the Internal Revenue Service's regulations. See *United States* v. *Campione, supra.* In any event, defendant was given the warnings prescribed by *Miranda* v. *State of Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 at the outset of the November 17th interview.[14] Certainly this would alert him that he might then be suspected of violating federal criminal statutes. No more was required. Cf. *United States* v. *Comiskey,* 460 F. 2d 1293, 1297 (7th Cir. 1972); *United States* v. *Campione, supra.*[15]

[9–11] Defendant's third argument to support his motions for suppression is based on a supposed violation of the one-inspection rule contained in 26 U.S.C. § 7605(b), which provides:

> "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for

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14. In contrast, in *United States* v. *Heffner,* 420 F. 2d 809 (4th Cir. 1969), the full *Miranda* warnings were not given. *Id.* at 811, 813.

15. *United States* v. *Blue,* 384 U.S. 251, 255, 86 S. Ct. 1416, 1419, 16 L. Ed. 2d 510, does not support defendant for the Court stated "Blue would at most be entitled to suppress" evidence secured by the Government in violation of the Fifth Amendment. No violation of the Fifth Amendment occurred in the instant case.

each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

Defendant argues the first inspection occurred on the occasion of agent Brown's audit closing in 1966 and that books and records of defendant examined between that date and November 18, 1969, were inspected in violation of the statutory rule. As shown, the criminal investigation by Popovitz did not commence before December 2, 1969. The books and records in question were obtained by the Internal Revenue Service on or prior to November 18, 1969, for use in their investigations of the Papanek brothers and Bluthardt. This statute does not apply to third-party investigations, but rather to the records of the taxpayer under investigation. *Hubner* v. *Tucker,* 245 F. 2d 35, 38-39 (9th Cir. 1957); cf. *United States* v. *Howard,* 360 F. 2d 373, 380 (3d Cir. 1966). The 1969 inspection of defendant's records was not concerned with the reexamination of his liability for a year already audited, so that the one-inspection rule is again inapplicable. See *Norda Essential Oil & Chemical Co.* v. *United States,* 230 F. 2d 764 (2d Cir), certiorari denied, 351 U.S. 964, 76 S. Ct. 1028, 100 L. Ed. 1484 (1956).[16] Additionally, the summons was served on defendant's accountant Schelly, and the bulk of the records in question were turned over by him to Revenue Agent Seto. Section 7605(b) has been held in-

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16. On the other hand, 26 U.S.C. § 7605 does bar a reexamination in connection with a redetermination of a taxpayer's liability for a year already audited. *Reineman* v. *United States,* 301 F. 2d 267 (7th Cir. 1962).

applicable to a taxpayer's records in the possession of his accountant. See *Hinchcliff* v. *Clarke,* 371 F. 2d 697, 700 (6th Cir.), certiorari denied, 387 U.S. 941, 87 S. Ct. 2073, 18 L. Ed. 2d 1327 (1967); *Bouschor* v. *United States,* 316 F. 2d 451, 457 (8th Cir. 1963); cf. *Geurkink* v. *United States,* 354 F. 2d 629 (7th Cir. 1965); *DeMasters* v. *Arend,* 313 F. 2d 79, 86 (9th Cir. 1963). We conclude the statutory one-inspection rule was not violated.[17] We need not decide whether the single inspection rule in 26 U.S.C. § 7605(b) should be enforceable by the exclusion of evidence obtained in violation of it in a criminal case. Cf. *Reineman* v. *United States,* 301 F. 2d 267 (7th Cir. 1962). However, it is noted that the proper means for enforcing this conditional statutory right is to challenge the summons at the time compliance is sought. *United States* v. *Powell,* 379 U.S. 48, 58, 85 S. Ct. 248, 13 L. Ed. 2d 112.

III. *Denial of Defendant's Request for Documentary Production*

[12] Under the Jencks Act, defendant sought to inspect the grand jury testimony of government witness Joseph Testa, who purchased six acres of the Schiller Park property from defendant. Pursuant to 18 U.S.C. § 3500(c), the district judge inspected Testa's grand jury statement and concluded that it did not "relate to the subject matter of the testimony of the witness," as prescribed by the statute. A similar determination was made with respect to the grand jury testimony of Special Agent Popovitz.

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17. Because 26 U.S.C. § 7605(b) was not violated, it was unnecessary to comply with the notice requirements contained therein and in 26 C.F.R. 601.105.

As prescribed by the same statutory provision, we too have examined the texts of these witnesses' grand jury testimony and conclude that the rulings of the trial judge were correct.

[13] Defendant also sought to inspect Special Agent Popovitz' "S.A.R." report, consisting of the summary of his investigation of defendant. However, such a report is not a "written or recorded statement * * * made by the defendant" within the meaning of Rule 16(a)(1) of the Federal Rules of Criminal Procedure under which production was sought. Defendant was given the memoranda of the Special Agent's interviews with defendant, so that he was not prejudiced by the denial ruling.

[14] Finally, defendant claims that it was reversible error to deny production of Agent Leigh Brown's transmittal letter of May 23, 1966, dealing with defendant's civil tax liabilities and transmitting his report of the same date to an IRS superior. As shown by the record, a copy of the report itself was given to defendant's accountant. Since the transmittal letter is not a "written or recorded statement * * * made by the defendant," he was properly denied production under Rule 16(a)(1).[18]

Affirmed.

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18. Neither Popovitz' summary of investigation nor Brown's transmittal letter was a "statement" as defined in 18 U.S.C. § 3500(e) and hence was not producible under the Jencks Act either. *United States* v. *Keig*, 334 F. 2d 823, 825 (7th Cir. 1964).

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-862

ROBERT R. KRILICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this proceeding under 28 U.S.C. 2255, petitioner contends that his conviction for tax fraud should be vacated because, after his original appeal, the court of appeals held in another case that defendants in tax prosecutions are entitled under the Jencks Act to production of the summary of investigation written by an Internal Revenue Service Special Agent who testifies at trial.

In May 1971, after a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully subscribing a false tax return for 1963, in violation of 26 U.S.C. 7206(1), and of attempting to evade tax, in violation of 26 U.S.C. 7201. He was sentenced to concurrent terms of eighteen months' imprisonment and fined $5,000. The court of appeals af-

firmed, holding, *inter alia*, that the district court had not erred in denying production of the Special Agent's summary of investigation that petitioner had sought under Rule 16(a)(1), Fed. R. Crim. P. The court noted in a footnote that the summary of investigation was not a statement producible under the Jencks Act either. 470 F.2d 341, 351 and n. 18 (C.A. 7). This Court denied certiorari. 411 U.S. 938.

After petitioner's conviction had been affirmed, the Seventh Circuit held, in *United States* v. *Cleveland*, 477 F.2d 310, that a Special Agent's summary of investigation is a "statement" producible under the Jencks Act; in so holding, the court expressly disapproved "the dictum in *United States* v. *Krilich*, 470 F.2d 341 (7th Cir. 1972) page 351 n. 18 * * *." 477 F.2d at 316, n. 10.

Petitioner then instituted this collateral proceeding under 28 U.S.C. 2255, requesting that his conviction be vacated on the ground that *Cleveland* should be applied retroactively to his prosecution. The district court denied the motion and the court of appeals affirmed (Pet. App. A, pp. A2, A3). The court of appeals noted that petitioner might not be entitled to relief even if *Cleveland* were to be given retroactive application (Pet. App. A, p. A5), but held that in any event *Cleveland* would not be applied retroactively to cases in which the judgment of conviction was entered before April 16, 1973, the date of the *Cleveland* decision (Pet. App. A, pp. A5-A12).[1]

The court of appeals correctly decided the question of retroactivity in a thoughtful opinion on which we rely. We briefly summarize that opinion here.

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[1]The court of appeals did not question petitioner's right to raise the issue of retroactivity in a collateral proceeding. Cf. *Davis* v. *United States*, 417 U.S. 333.

The court of appeals first determined that the change in the law of the circuit represented by *Cleveland* was not of a kind to require retroactive application. The effect of the producibiliity of the Special Agent's summary would not have been "to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Robinson* v. *Neil*, 409 U.S. 505, 509. Nor did the *Cleveland* decision raise "serious questions about the accuracy of guilty verdicts in past trials * * *." *Williams* v. *United States*, 401 U.S. 646, 653.

The court therefore applied the balancing tests of *Stovall* v. *Denno*, 388 U.S. 293, and *Johnson* v. *New Jersy*, 384 U.S. 719. The court concluded that *Cleveland* should not be given retroactive effect. The court determined that the procedures followed prior to *Cleveland* had not significantly impaired the integrity of the process of truth-determination; that the purpose of the *Cleveland* decision will be adequately served by prospective application; that the district courts in the circuit had properly relied upon prior Seventh Circuit decisions in denying production of Special Agent's summaries in the past; and that retroactive application of *Cleveland* would interfere with the sound administration of justice because retrial of petitioner and other persons similarly situated would in many cases be impracticable.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.